1. The subject draft bill is unwise from a policy standpoint and inadequate for the proper accomplishment of its stated purpose, i.e. the collection of foreign intelligence information. Because the time for review of this draft bill was so brief, this memo represents only initial impressions.

2. Enactment of such a bill would constitute an official acknowledgement that mail opening was contemplated as an intelligence collection method. Additionally the diplomatic community's reaction to this admission must be considered.

3. If indeed "obtaining foreign intelligence information" is the purpose of the draft bill, it is inadequate. The bill provides for opening "first class mail in the United States postal channels" pursuant to a judicial warrant obtained on probable cause that "the person whose mail is to be opened is consciously engaged in spying, sabotage, or terrorist activities, pursuant to the direction of a foreign government or terrorist group." The term "postal channels" is not defined. It is not clear whether the term includes any activities handling mail outside the territorial limits of the United States. Also, no distinction is made between mail originating in the United States and mail originating in a foreign country. Although the short title states that the bill is to provide for the "opening of mail to obtain foreign intelligence information," the only grounds for mail openings actually provided for in section 2529(a)(3) and section 2530(a)(3) relate to counterintelligence and counterterrorist activities. There is no provision to open mail that may contain narcotics intelligence. More importantly, there is no provision for obtaining foreign positive intelligence deemed essential to the national security but unrelated to a particular spy or saboteur. Indeed the bill is couched throughout in law enforcement terms for law enforcement purposes and ill-serves the purposes of an agency responsible for foreign intelligence collection. If there is to be some provision for mail opening on the grounds of espionage, sabotage, and terrorism, there should also be a provision made for mail opening for the collection of foreign intelligence essential to the national security.

4. The bill requires judicial warrants for all mail openings. It is questionable whether warrants are constitutionally required in all cases of mail opening. At present warrantless electronic surveillance for national security purposes is lawful. As suggested in 18 U.S.C. 2511(3), such warrantless interception may be made not only for counterintelligence purposes but also "to obtain foreign intelligence information deemed essential to the security of the United States...." Logically, the foreign intelligence exception to the warrant requirement recognized in the Brown and Butenko

decisions would seem to apply as much to mail openings as to electronic surveillance. Thus, as constitutional matter, the search of first class mail, at least that originating from foreign powers and their agents, presumably would be permissible upon authorization by the President if there were reasonable grounds to believe that it contained foreign intelligence information. Consideration should be given to inserting in this draft bill a disclaimer similar to that contained in section 2511(3) of the electronic surveillance chapter of Title 18.

5. Even if accepted in principle that all mail openings should be pursuant to a judicial warrant the probable cause standard is inappropriate in the field of foreign intelligence collection. A lower standard should be applied at least with respect to mail originating in a foreign country. In this connection it should be noted that all mail originating outside the United States is subject to customs examination, at least when there is reasonable cause to suspect that it contains contraband. While the authority for customs examination does not extend to reading the letters, it would be strange to apply a higher standard to obtaining information essential to the national security than is applied to administering the customs laws.

6. Sections 2529(a)(3) and 2530(a)(3) require that "the person whose mail is to be opened is consciously engaged in spying, sabotage, or terrorist activities...." It is not clear whether the words "the person whose mail is to be opened" refer both to the individual who sends the mail and the individual to whom the mail is directed. This phrase could be interpreted to refer only to the former individual or only to the latter. If so, the character of the sender or recipient taken alone should not be the decisive element in approving an application for a warrant. This is especially true where there is no distinction between mail originating within the United States and mail originating in a foreign country. For example, where a letter is sent from a foreign country to an individual within the United States, it is unrealistic to expect the applicant to establish probable cause that the sender is a spy or saboteur.

7. There are several other technical points regarding this bill:

(a) Under section 2530(c) a warrant may approve the opening of mail for a period no longer than 30 days. For a slow-moving medium like the mail, it is believed that this period of time is much too brief.

(b) If an emergency mail opening is authorized under section 2530(d), a subsequent order approving the opening must be obtained within 24 hours. It is believed that this period is much too brief for preparing the necessary certification and application for the judge. Forty-eight hours would be more reasonable.

(c) Section 2531(b) permits information incidentally obtained from a mail opening to be retained and disclosed if it relates to "evidence of a violent crime." The term "violent crime" is not defined in the bill. Furthermore, there is no reason that this restriction be limited to violent crimes. For example, espionage and treason are not considered violent crimes. Perhaps "felony" should be substituted for "violent crime."

(d) There are no security provisions in the bill for handling the process which presumably would be classified. For example, the reports made to the Administrative Office of the United States Courts required under section 2532(a) would be classified and there is no authority for that Office to handle such information.

(e) The minimization procedures required to be followed to minimize the acquisition and retention of information not directly relevant to the purposes of this bill may impinge upon the flow of information to liaison services where such information is very important to a liaison service's foreign intelligence interests.